

## Senatorial and Judicial First Amendment Rhetoric of Hugo LaFayette Black

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### Abstract

*Hugo LaFayette Black is most remembered not as a Senator from Alabama but as a Justice of the United States Supreme Court. A large part of Justice Black's Supreme Court Justice legacy is as a defender of First Amendment freedoms. Justice Black considered the First Amendment to be "the heart of our government." While on the Supreme Court, he developed an absolutist approach to the First Amendment, arguing that even libelous and obscene speech is protected. To Black, his interpretation of the First Amendment was focused on the Framers' intent. As such, Black's opinions have drawn a line between speech and conduct, whereas speech is protected, but conduct that is not speech (such as picketing and demonstrating) is not protected.*

*Less is known of Black's perspectives on the First Amendment while he was a United States Senator. Political historians portray Senator Black as a Klansman, a supporter of the New Deal, an opponent of the Wagner-Costigan Antilynching Bill, and an opponent of interference with local habits and customs. In particular, historical notice of Black's political tenure in the Senate focuses overwhelmingly on his membership in the Ku Klux Klan. Although Black's Klan membership is an important factor in reviewing Black's senatorial career, it has overshadowed a thorough examination of Black's rhetoric and political perspectives demonstrated during his tenure as a Senator from the State of Alabama.*

*This paper examines Black's senatorial and judicial rhetoric on the First Amendment to provide a broader historical perspective of Hugo L. Black during his tenure as a United States Senator from 1927 to 1937 and tenure as United States Supreme Court Justice from 1937-1971. The author examines Black's floor speeches and debates in the Congressional Record and Black's judicial opinions and speech to the Columbia University Law School while serving on the United States Supreme Court. This study is intended to provide a more comprehensive analysis of Hugo LaFayette Black on the First Amendment.*

Hugo Lafayette Black (1886-1971) graduated from the University of Alabama Law School in 1906 and opened a law office, eventually to become one of Birmingham, Alabama's top plaintiff attorneys. As an attorney, he was held in high regard by the bar and was considered polite, steadfast, and intelligent. Black served as a part-time police court judge hearing petty criminal cases while continuing his private practice, and in 1914 was elected Prosecutor of Jefferson County, Alabama. In 1917, Black resigned as Prosecutor to join the Army, attaining the rank of Captain and receiving an honorable discharge in 1919. After military service, Black went back to Birmingham, Alabama, to continue his legal practice. In 1923, Black became a member of the Ku Klux Klan, which he maintained for two years. Black quietly resigned his membership in the Klan, while maintaining benefits of such membership with Klan voters.<sup>2</sup> Of

particular benefit of this membership was his election to the United States Senate. Black served as a Senator from the State of Alabama until he became a Justice of United States Supreme Court in 1937.

Justice Hugo LaFayette Black has been described as a fierce champion of the First Amendment. Little, if anything, however, focuses on an analysis of Black's pre-Supreme Court ideas and growth into a strong supporter of the First Amendment. In the United States Supreme Court, Black demonstrated his high regard and desire to uphold the mandates of the First Amendment, contending that the First Amendment is the keystone in the Bill of Rights and is all but absolute. Black's concept of absolute freedom of speech did not emerge until the McCarthy era when Black was an Associate Justice on the Supreme Court. Although accounts of Black's support of the First Amendment exist in historical analyses of Black's judicial rhetoric, little has been written about Black's pre-judicial philosophy on First Amendment issues. This paper addresses Hugo Black's perspectives on First Amendment issues while serving in the United States Senate and Supreme Court in order to provide a more thorough examination of Hugo Black's First Amendment ideas and beliefs.

In 1926, Black ran a successful underdog campaign for the Senate and acquired the position of the newly-elected United States Senator from Alabama. Black took the oath of office on the floor of the Senate on December 5, 1927. When Black came to the Senate, he fulfilled a goal "to occupy an inconspicuous place in the Senate." Senator Black became an avid reader when he came to the Senate, reading works that included Aristotle, Cicero, Adam Smith, Franklin, Hamilton, Jefferson, Rousseau, Montesquieu, Bryce, Mill, Marx, Spinoza, St. Thomas Aquinas, and John Locke.<sup>3</sup> These readings were influential in his thinking about the Constitution and human nature, and such readings were reflected in Black's speeches in the Senate. As Hugo Black biographer Roger Newman stated, "[t]he contrast between Jefferson and Hamilton was a constant theme of Black's speeches and actions. The mere sight or sound of Hamilton's name launched him on a fit of oratory."<sup>4</sup> In his first term as Senator, Black saw himself as a Jeffersonian Democrat who supported the will of the people. However, during his second term in the Senate, and largely due to his first-term experience in Washington, Black became resolved to take greater risks and abide by his own beliefs.

When Senator Black was in his first term as Senator, he became skilled at parliamentary procedure. He possessed a great ability to assert direct and important questions and statements

about proposed legislation that demonstrated Black's knowledge about issues being proposed and that encouraged further analysis of debated legislation. Black's refined rhetorical skills of direct and cross examinations, which were largely developed during his practice of law as an attorney, are demonstrated in his questions on proposed legislation. Black's first senatorial fights concerned Muscle Shoals on the Tennessee River and a spontaneous rebuttal that he made against Senator William Bruce's attacks on the deep South during Bruce's arguments over the issue of prohibition. Senator Black supported development of Muscle Shoals on the Tennessee River with a lease agreement with private operators to produce nitrates for fertilizer. As for Black's spontaneous rebuttal in support of "Dixie", Black asserted that he made no apology for being from what Bruce called the "Confederate States" and argued that the South was "a land composed of noble and brave and patriotic and loyal law-abiding citizens."<sup>5</sup>

Thereafter, when Black decided to enter Senate debates more frequently, his primary fights were for the LaFollette-Costigan relief bill for a federal emergency relief bureau, a thirty-hour work week, the Black-Connery Bill for a fair labor standards board administration of wages and hours, and support of President Roosevelt's Court-packing plan. Black was a loyal supporter of the New Deal and backed Roosevelt's "Court-packing plan" that intended to undercut power of conservative justices to declare New Deal legislation unconstitutional. Black, who opposed interference with local habits and customs, was an ardent opponent of the Wagner-Costigan antilynching bill, contending that it would anger white southerners and repeat mistakes made during the Reconstruction era and the bill was anti-labor. The theme in many of his arguments centered on his support for the "little man" over the few well-financed corporations, particularly monopolies that hinder the voices of the many over the special interests of the wealthy few.

While serving in the Senate, Black did not represent himself as a bold supporter of the First Amendment freedoms; however, indications of support for freedoms of speech, assembly, and religion were revealed, gradually, in his rhetoric. In May of 1929, Black argued in the Senate against a proposal to reapportion the House of Representatives, a plan that provided for the State of Alabama to lose one representative. Black demonstrated signs in his arguments of a support of First Amendment principles of public voice and representation without monopoly. Black argued:

The followers of Hamilton, the followers of that man who believed in a rule not by the people but in a rule by the privileged classes are in the saddle, booted and spurred, riding

roughshod over the privileges of the people as they whittle and whittle away from their representatives and place in the hands of one man. . . . One by one, their rights are being taken away; little by little, inch by inch, gradually, as the stones of the earth are worn away by the beating water, the legislative functions have been sacrificed as additional powers have fallen into the basket of the Executive.<sup>6</sup>

However, in the same year, Black argued against powerful special interest lobbyists “intent upon special privilege, public pillage, and public plunder.”<sup>7</sup> Against his later judicial First Amendment arguments supporting anonymity, Black argued in the Senate that he proposed laws requiring lobbyists to name their employees, state their objectives and report their expenditures. However, on the whole, Black was standing by his stance in support of the people whose voices to government are hindered by finances when special interests backed by great financial wealth had little trouble having their voices heard. It was Black’s belief that lobbyists hidden behind masks are enemies of the government or else they would not fear public knowledge. It was during these debates that Black’s ideas for availability of public discussion by all citizens appears.

In what appears as an effort to support the separation of church and state, Black sided with nine other Senators in a lost effort to prevent the navy from flying a pennant bearing the cross of Saint George above the American flag during church services aboard ship.<sup>8</sup> In a May 1929 radio speech, Black proved himself as supporting free speech limits, much more so than his absolutist stance that he later adopted while serving as a justice of the United States Supreme Court. In that radio speech, Black sought to support his Senate fight for suspension of all immigration for five years by arguing that “[t]he confusion of alien tongues clamoring among themselves as to their rights in our country.”<sup>9</sup>

It was clear from Black’s early life and two years in the Senate that Black had not previously taken a stand for First Amendment freedoms. However, in 1929 and 1930, Black demonstrated his first strong support for First Amendment freedom of speech and thought in the form of a Senate speech in opposition to government-mandated censorship. Black opposed an amendment to the Smoot-Hawley tariff Act that would have allowed customs inspectors to ban certain literature of foreign origin from entering the United States. The Smoot-Hawley tariff Act was primarily intended to control the import of allegedly obscene publications. Senator Black asserted, “it had not been my purpose to say anything with reference to the amendment, but some

things have been said which cause me to desire to make my position clear of record.”<sup>10</sup> Black began with a strong defense of freedom of speech, arguing:

No one will question the fact that freedom of speech can be abused. No one will question the fact that a sufficient abuse of the freedom of speech should be punished. I am so firmly convinced, however, that this is one of the most sacred privileges of a democracy that I can not vote for any measure or any legislation which tends in the slightest degree to restrict its inestimable privilege.<sup>11</sup>

Black then incorporated his recent readings into his discussion, making particular note of his reading of John Locke two days earlier, noting old Alexandria with its great library and visions of “monarchs as they go there and lay their hands upon this library to deprive the world of the knowledge which they were entitled to have.”<sup>12</sup> Black argued that a few “high and mighty” powers determined the standards of right during that time and for all posterity. Black spoke against these individuals that determine what is right and wrong for all. He argued that history demonstrates the “conflict between those who believe in freedom of human thought and those who believe in restricting and shackling the human intellect,” and the great discoverers and philosophers have ultimately been held up to the “scorn of the people because he dared to express views contrary to the existing sentiment.”<sup>13</sup> After being questioned by fellow senators about Jesus Christ and the *Bible* and Black addressing those questions, Black continued, “The principles to which I refer and the remarks which I am making are those which grow necessarily in a democracy if human liberty is to be preserved. There are some fundamentals which must not be overlooked or overstepped. One of them is the freedom of speech. Going hand in hand with it is freedom of religion and freedom of peaceable assembly. We can not separate these.”<sup>14</sup>

Amidst Black’s floor speech, he was asked from a fellow Senator what analogy Black found between the teachings of anarchy and teachings of Christ. While Black sought to speak of free speech, his fellow senators continued to bring Black’s discussion in the realm of religion. To the anarchy question, Black again recalled historical precedent. Black argued that Thomas Jefferson and Samuel Adams were called an anarchist in England, lives of Colonial “great patriots” who first asserted human liberty were threatened, and Voltaire dared to condemn the execution of an individual accused of knocking over a wooden image of the Virgin Mary that contributed to Voltaire’s exile from his country. Black cited Jefferson, Locke, Adams,

Hancock, Hamilton, and other revolutionaries who fought by force to overturn a government. Black added:

How can those of us who claim to believe in the doctrine of American liberty, those glorious principles in which this Republic was conceived, in which it was born, through which it has come on down the years of its glorious career, say that the very books that formed the basic philosophy on which Jefferson and his friends acted shall be barred to-day at the port of entry because they dare to assert the irrevocable right of the people to their own liberty and to assert the right to that liberty whenever tyranny and oppression lay their unholy hands upon them.

So far as I am concerned. I stand to-day and I will stand in the future, against any legislation of any kind that would interfere with the sacred right of the American citizen to think as he sees fit and to be persuaded in no way except by logic and reason. I am unalterably against any attempt to prevent the distribution of literature so long as the juries in the States, where public sentiment is made, have it within their power to condemn the distribution of that literature as being deleterious to the morals of their people.<sup>15</sup>

With his floor speeches over the proposal to ban certain foreign books from entering the United States, Black demonstrated a strong support for First Amendment freedoms during this early part of his first term as Senator. Black added:

The human mentality of America has not yet sunk so low that we must necessarily set up at the ports a barrier beyond which no literature shall pass. If that literature is contrary to the public sentiment of the States, the individual who brings it into that State can be tried and the jury will convict him. I have no hesitancy in saying that the jury should convict him when literature is so obscene as to be contrary to good morals and decent society. I do say, however, that until he stands and faces a jury of his peers no individual servant of this country ought to be given sufficient power to take away a single leaf or page from his book nor to put him to one penny's expense.

This is a more far-reaching subject than simply dealing with a few books. It gets down to the very fundamental principles of government. As was pointed out by the Senator from New Mexico [Mr. CUTTING] on yesterday, it is a little bit strange and quite a coincidence that a number of the books which has been prohibited from coming

into this country have been those which tend to point out to the people the evils of warfare. It is a little bit peculiar that in this day, when there are some who would plunge this country into terrible conflict merely for profiteering through the building of ships and the construction of armaments, this Government should have used its vast power to censor their literature, a power which its citizens never turned over to the Government. It is a little bit peculiar that it should have used its vast power to bar from our ports books which tend to bring about peace and to condemn war.<sup>16</sup>

It was a rousing speech in defense of freedom of thought and speech. Black described freedom of speech as a “fundamental necessity of democracy” and characterized the freedom of thought as the “only privilege that separates the citizen of a democracy from the citizen of a monarchy and absolute despotism.”<sup>17</sup>

In support of the Smoot-Hawley tariff Act, Senator Smoot cited books such as *How Young Girls Can Seduce Boys* and *How to Seduce Young Girls*. Black argued that “all books are not bad.”<sup>18</sup> Black contended that “this is one of the most sacred privileges of a democracy that I can not vote for any measure or any legislation which tends in the slightest degree to restrict is inestimable privilege.”<sup>19</sup> Despite this seemingly strong stance, after modification to the amendment that called for disputes to come before a court and questionable books being limited to those that urged illegal actions such as treason, rebellion, insurrection, or forcible resistance, Black agreed to the amendment as modified.<sup>20</sup> Yet, while agreeing with the modified amendment, Black did warn of a potential slippery slope with the tariff ban, citing reference to the Alien and Sedition Acts of 1798.<sup>21</sup>

The arguments of Black on the Smoot-Hawley tariff Act demand further analysis in the determination of Senator Black’s ideas about freedom of speech prior to his assertive First Amendment protector role demonstrated in his service on the Supreme Court. Black’s words against censorship are quite telling of his position on free speech during his Senate years. Of note is Black’s perspective on the debated publications. Black contended, “I do not deny the charges that have been made against these books by the Senator from Utah. I think there are many of them that are unfit for publication. They are filthy. They are obscene. They are vulgar. They are dirty. They are low and base.”<sup>22</sup> Black made his position clear that he was opposed to the circulation of the alleged obscene publications. But Black isolated the debatable issue as follows, “The difference in this question is not as to the kind of books, so far as I am concerned,

but who shall determine the book that is near the border line? Who shall say whether it is good or bad?”<sup>23</sup> Black further stated, “But the difference is this: A book that I might hold, from my idea, was bad some one else might hold was not bad for the public morals. Therefore, the difference is as to where and what tribunal shall determine whether the book is good or bad.”<sup>24</sup> It was Black’s contention that the decision of obscenity should be a question for a court, not a question in the hands of an inspector. Black opposed Senator Smoot’s contention that obscene books are only printed outside of the United States while none are printed in the United States. Black argued, “Oh, I have seen some of them that were printed in this country that would shock the morals of a man who has not been in church for 40 years.”<sup>25</sup>

Even as a early 1930’s Senator, Black was articulating a position of an offensiveness test, arguing “but there might be others that are close, as I said, to the zone where they might be offensive to some and not offensive to others.”<sup>26</sup> Consistent with his Senatorial rhetoric, Black again referenced citation from his readings, arguing, “I presume it comes, perhaps, from reading a great deal of Thomas Jefferson’s philosophy—I have an inherent, well-grounded opposition against vesting in the hands of an individual judicial powers on matters of supreme importance with reference to the dissemination of human knowledge.”<sup>27</sup> Despite his reference to Jefferson, Black offered support for the Act to ban import of “bad” books if modification to the Act was made to require judicial examination after the book(s) are seized at the border, rather than decision by a sole custom inspector as to a publication’s status as “good” or “bad”. Black pointed out that some people find the Koran, the Bible, and The Book of Mormon dangerous. As to Black’s legal contention, he argued, “I did not state that this is a question of law. It is a question of fact, and should be a question of fact mixed with law if it gets into court, as most questions are.”<sup>28</sup> Moreover, Senator Black encouraged an amendment change with the following wording: “Containing any matter advocating or urging treason or insurrection against the United States” so that a submitted portion of the Act included the following words: “Containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States. . . .”<sup>29</sup> Black voted to accept this proposed amendment to the Act; however, he continued to oppose a final decision (despite the possibility for appeal) being placed with a sole customs inspector or clerk under the Treasury Department, arguing, “I do not believe in the principle of permitting a customs inspector to act as censor of books for the

people of this Nation.”<sup>30</sup> Black agreed that any questionable publication would remain in the possession of an officer until the case could be tried.

In 1930, Black sought unanimous consent to insert into the Senate Record an article by Arthur McEwen that was published in the New York American and Journal of March 25, 1906, titled “To Criticize the Supreme Court Is Not Blasphemy.”<sup>31</sup> When proposing this article’s placement in the record, which was accepted without objection, Black stated, “This is a very interesting article, to which I invite the attention of Senators.”<sup>32</sup> The article contended that the people look upon their government, particularly the courts, as apart from and above them, which should not be encouraged in a Republic in which the safety of that Republic depends upon the intelligence of its citizens. The article stated that the worst service a citizen can render his country is to respect a court that ceases to be just and impartial, the Supreme Court has become the master of Congress and the President by guiding actions of these other branches of government under the pressure to act so that such action meets the approval of a judiciary that can hold office for life without an accounting to their constituents, criticism of the Supreme Court is an “American privilege, and the Court is made for the people rather than the people for the court.”<sup>33</sup>

In 1931, Senator Black engaged in a debate over copyright legislation. Black questioned whether under the proposed legislation a picture taken by a photographer automatically entitles the photographer with a copyright at the very moment the picture is taken. Black demonstrated a mastery of debating skills in a legislative discussion that encourages thorough analysis of a proposal:

Mr. BLACK. In other words, if under this bill a man happens to have a portrait taken and does not stipulate in advance with refernce to his portrait the photographer would have a copyright on his portrait for 70 years. Is that correct? In other words, the man who happened to have the portrait taken could not use it for 70 years, even for a cut to be used in a newspaper?

Mr. HERBERT. The language of the bill is very specific on that point. On page 8, in line 10, it is provided—

Except in the case of photographic portraits made for hire or on commission, in which case, in the absence of written agreement to the contrary, the copyright shall vest in the person whose portrait is reproduced or his legal representatives.

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Mr. BLACK. In other words, if the portrait was taken without the individual paying anything for it, then for 70 years the photographer, his successors and assigns, would have the copyright automatically?

Mr. HERBERT. The Senator can not read that construction into the section.

Mr. BLACK. That is what I understood the Senator to say.

Mr. HERBERT. Except in the case of agreement to the contrary, the copyright on the photograph belongs to the subject of the photograph.

Mr. BLACK. I desire to call the attention of the Senator from Rhode Island to the fact that the exception to which he refers is only in case the portrait is made for hire or on a commission. In cases where it is not made for hire or on a commission the photographer would have automatically a copyright on the portrait.

Mr. HERBERT. That is true.

Mr. BLACK. So if some one happens to come to the Senator's office and takes his picture, and he does not pay them for it, and later on he should desire to use it for the purpose of having a newspaper cut made, he could not do it for a period of 70 years without infringing on their copyright.

Mr. HERBERT. He would have the copyright in the photograph which he took.

Mr. BLACK. It would be automatically a copyright for 70 years?

Mr. HERBERT. Yes.

Mr. BLACK. The mere fact that he takes the portrait and the Senator did not happen to pay him for it at that time would give him for 70 years the right to deprive the Senator of the use of his own picture.

Mr. TRAMMELL. In other words, if some one came to the Senator's office and obtained his photograph and then furnished him with one or two copies of the photograph and later on some newspaper man came along and asked for a photograph for the purpose of having a cut made and the Senator turned it over to the newspaper and the newspaper made a cut from it, the newspaper would then be subject to damages on account of the photograph made by the photographer.

Mr. BLACK. Unquestionably; and if the Senator happened to show that photograph to some one he would be infringing on the copyright.

May I ask the Senator another question?

Mr. McKellar. Mr. President, before the Senator leaves that point I would like to ask the Senator from Rhode Island a question.

Mr. BLACK. Very well.

Mr. McKELLAR. Surely the Senator from Rhode Island does not want us to enact a law like that. Will he not accept an amendment striking out that provision? It would lead to a very remarkable situation. Men in public life are frequently called on for a photograph and we would never know whether we were violating a copyright and making ourselves liable for damages. It would probably stop the giving away of photographs by public men and by actresses, the latter being very greatly interested in advertising, as we know. They send out thousands and thousands of photographs and I think that they as well as the political public should be protected somewhat in this matter. I do not think they ought to be subjected to lawsuits when they give away their own photographs or portraits for any purpose.<sup>34</sup>

Not only does this debate encouraged by Black demonstrate his mastery at Socratic dialogue, it again indicates Black's opposition to monopolies. Such was revealed in Black's inquiry of whether "all matters of copyright or matters of grant by the Government are of special privilege which are frequently used as a monopoly, as the Authors and Composers Union of New York is using it at the present time?"<sup>35</sup>

If one argues that copyright law, under the issues debated by Black, are not restrictions on speech, but instead provide protection of speech because copyrights promote idea dissemination and creativity in expression, then it also arguable that Senator Black is again demonstrating a stance counter to free expression. On the other hand, it is also arguable that the impetus of Black's ideas and questioning of the copyright legislation is supportive of freedom of expression due to his indications, as demonstrated in previous debates, against monopolies that can stifle freedom and, in this case, hinder the dissemination of information or images. Because Black's intent of his argument was not expressed during his lifetime, it is uncertain whether Black was indicating a support or restriction of free expression in the debate beyond that which was directly expressed in his rhetoric and analysis of the issue.

On April 18, 1933, Black presented a letter to have read into the record with the name and address of the author omitted from the record upon the author's request, and Black further requested that the letter be returned to him after it was read before the Senate. The letter stated:

Toledo, Ohio, April 17, 1933

Hon. Hugo Black.

SIR: Are you sponsor of the 30-hour week? If so, I would like to inform you that the Electric Auto Light & Co., Logan Gear co., and Bingham Stamping Co. have made threats that if we don't sign papers that we do not want it passed we are subject to discharge on refusal to sign paper. We are all in favor of the law. If you are not sponsor please pass this to one who is.

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The letter was read into the record without objection. The following day, a discussion over this letter arose by Senator Bulkley, who presented a rebuttal telegram from the companies accused of threats in the letter presented by Senator Black the previous day. The rebuttal telegram stated:

Hon. R. J. Bulkley.

*United States Senate, Washington, D.C.:*

Associated Press carries story that Senator Black today read into Senate Record anonymous letter to effect Electric Autolite Co., Logan Gear Co., and Bingham Stamping Co., of Toledo, had threatened their employees with dismissal if they did not oppose so-called "30-hour week" bill. Will appreciate it very much if you will see that in same Record is written statement that this is absolutely false; that no employee has been so threatened.

The Electric Autolite Co.

Logan Gear Co.

Bingham Stamping Co.<sup>37</sup>

Senator Bulkley, after presentation of this rebuttal letter, argued that, "in all fairness", the letter read into the Record on the request of Senator Black was not an anonymous letter because the author requested, "for obvious reasons", that his name not be disclosed and Senator Black was properly respecting that request.<sup>38</sup> Senator Bulkley then maintained that the author of the letter presented by Black was based on unfounded allegations. In rebuttal of Senator Bulkley's argument of the unfounded allegations, Black remarked that the only information he had relative to it was contained in the letter itself; however, Black noted that he received similar letters and requested that another letter, which also requested that his name be omitted, be read, which was

read into the Record without objection. Black contended that he knows that “no Senator would expose a writer’s name where it might do injury. . . .”<sup>39</sup>

In 1935, Black reintroduced his lobbying proposal that was unsuccessful approximately six years earlier. The reintroduction of the lobbying legislation, this time successful in the Senate but unsuccessful in the House, was largely due to the invasion of lobbyists in Washington during the New Deal era. Soon thereafter, Black argued, “The greatest enemy of a free press in America is the man who is willing to subordinate it and to invade the sacred rights of the privacy of American citizens whenever he can do so to put filthy dollars in his pocket.”<sup>40</sup> When arguing for Roosevelt’s “Courtpacking Plan”, Black maintained, “It is my belief that the part of the Bill of Rights which protects free speech, free religion, and a free press constitutes the real bulwark of liberty and that a suppression of these rights would destroy our Nation as a Democracy.”<sup>41</sup>

Black strongly supported and participated in the Senate Lobbying Investigating Committee, which sought to free government from hidden, well-financed propagandist lobbyists to stifle political corruption and did so by subpoenaing telegrams. A Committee tactic used to acquire telegrams was to require telegrams to be furnished to the Committee by telegraph companies. In early 1936, Black defended the actions of the Committee on the Senate floor, arguing in rebuttal to criticism over the Committee’s use of subpoenas to acquire information on lobbyists that “[t]he present lobby committee has not swept our traditions into the fire, but alleged that certain special interest groups “are the ones who have swept into the fire, in practically every State in this Nation. . . every piece of paper, every telegram, every letter, and every other memorandum which would tend to show their activities in connection with certain legislation.”<sup>42</sup> Black added that [i]t was not the traditions that have been thrown into the fire; it was the telegrams that were thrown into the fire.”<sup>43</sup> Black urged Senators:

We want to tell you gentlemen to bring these papers to us if you think they have anything to do with the question we are investigating; we want to tell you in advance that we know that there is an effort to keep the committee from getting them, but we must proceed gently or else we will have the opinions of the great deceased Justice Holmes read, a man who stood not for this kind of a crowd, a man whose voice was raised and whose pen always wrote not for the selfish lobbyists, not for the special interests, not for the group that try by money to control legislation and politics in this Nation, a justice who was one of the greatest spokesmen America ever had for the plain, average, everyday citizen.”<sup>44</sup>

Senator Black proved himself an aggressive supporter of weeding out hiding lobbyists that work to anonymously influence the government. Black further urged the Senators to “look behind all this talk about privacy” because the “destroyers of papers are not interested in privacy”, but instead interested in “continuing to conceal from the people of this Nation the devious and subterranean methods used to defeat legislation—to the advantage of a few plutocrats in this country and to the disadvantage of the great masses of the people.”<sup>45</sup> Black assured the Senate that the Committee was not interested in, nor has it used, private telegrams during the lobbyist investigation.<sup>46</sup> In furtherance of his arguments, Black contended that citizens have the right to petition Congress, but it is that citizen’s right, it should be that citizen’s petition, it should represent honest views, it should not be “bought or coerced”, and a Senator is entitled to know any selfish interest of any person or entity that pays funds to back a petition.<sup>47</sup> Moreover, Black questioned the good of a constitutional right of petition if government permitted conditions in which it would be impossible to determine if the messages were honest views of the writer or false paid propaganda.

As he did in 1930, Black again submitted an outside source materials to be printed in the Senate Record related to a First Amendment freedom. In 1936, Black submitted two items for publication in the record, a radio address of Senator Schwellenbach concerning the activities of the Senate committee investigating lobbying activities and an editorial on freedom of the press. The radio address by Schwellenbach was in response to statements made by Mr. Jouett Shouse, President of the American Liberty League about Shouse’s concern that “Every telegram sent by any citizen of the United States to anyone in Washington between February 1 and December 1, 1935, has been subject to examination by the Federal Communications Commission or the Black committee.”<sup>48</sup> Schwellenbach quoted Shouse as stating “if you, wherever you live, sent any telegram, however private, to anyone in Washington, or if you sent any telegram, however private, out of Washington to anyone in the world upon any subject, your telegram has come under the prying eyes of the new inquisition.”<sup>49</sup> In the radio address, Schwellenbach alleged that Shouse was distorting the facts and asserted that Shouse was led by financial motives and the American Liberty League is a “propaganda organization” bent on discrediting President Roosevelt to prevent his reelection. Schwellenbach’s address did not assert that telegrams had not been seized and read, but attacked criticism of the Senate Lobbying Investigating Committee. In defending the Investigating Committee, Schwellenbach stated in the radio address:

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It is the Senate Lobbying Investigating Committee which revealed that telegrams concerning legislation, numbering close to 100,000 were received by Members of Congress during this last year, which telegrams bore the signatures of persons who had never authorized them. It is this committee which disclosed that in securing names for telegrams protesting against the Wheeler-Rayburn bill the power companies of the country used telephone directories and city directories as the sources from which they secured the unauthorized names. It is this committee that disclosed the fact that upon one piece of legislation last year there was brought to the city of Washington, with expenses paid and with compensation paid, the most intimate friend of each of the Members of Congress who could be obtained, and that those intimate friends discussed legislation with the Congressmen under instructions from their sponsors not to disclose the fact that they were being paid to come to Washington as lobbyists. It is this committee that disclosed the facts concerning the social lobby in the city of Washington, in which Members of Congress were invited to dinners and parties, the expenses of which were paid by the corporations interested in legislation, which fact was carefully and cleverly concealed from the Members of Congress, and at which legislation in which the corporations were interested was discussed and argued. It is this committee that is disclosing that dozens of so-called investors' organizations, patriotic organizations, taxpayers' organizations, which have sprung up throughout this country in the last year and a half, apparently representing investors, or taxpayers, or patriotic citizens, were in truth and in fact nothing but fakes and frauds, binanced by the railroads, the power companies, the munitions companies, and the Wall Street banks. These are just a few of the typical revelations of this committee...<sup>50</sup>

The radio address further mentioned that the committee used proper methods and "assiduously attempted to protect the constitutional rights of everyone concerned with the investigation", and Schwellenbach denied that the investigative committee used the Federal Communications Commission to secure information or telegrams, but instead used "only the recognized and established power of the United States Senate" and only telegrams that were engaged in the business of lobbying.<sup>51</sup> This radio address supported by Senator Black further stated that the investigative committee's acts were successful in freeing government from political corruption.

The second item submitted for print in the Senate Record was an editorial was published in the New York Post titled “Freedom of the Press.” The editorial stated that “it’s not a bad idea to have publishers talking about freedom of the press—even if it is for the wrong reasons” because “[t]hey may talk themselves into exercising it.”<sup>52</sup> The editorial went on to state, in part, the following:

... Like many other wealthy men, most publishers didn’t and don’t like Mr. Roosevelt because he has been trying to give the underdog a break.

...

The A.N.P.A.’s latest to-do is about the supposed “freedom of the press” of the most “cynical, mercenary, demagogic” chain of papers in the country—the Hearst press.

The A.N.P.A. is terribly worried about dictatorship. So are we. The seeds of trouble in this country are being sown by a network of Fascist and semi-Fascist propaganda agencies parading as voices of the people when they are really barnacles on the purse of Wall Street. The Black committee is showing up these organizations, their real backers, their real motives, their ugly methods, their fake telegrams.

Senator Black and his colleagues are cramping the style of these budding Fascist groups, which are the real menace to American liberties. Does the A.N.P.A. have one word of condemnation for their methods? Does it raise its voice on behalf of the freedom of minority groups? No. It seeks to make America’s most irresponsible publisher a martyr to freedom of the press.

...

So long as readers continue to see large sections of our press bending the knee to any wealthy interest, suppressing this, and distorting that, hounding reformers, slandering labor, keeping silent in the face of suffering and deception, the public isn’t going to take these crocodile tears about “freedom of the press” very seriously.

It is characteristic that the A.N.P.A. held its great forum on freedom of the press behind closed doors and gave out canned releases to the press.<sup>53</sup>

The editorial was printed in the record without objection.

Justice Hugo L. Black served on the United States Supreme Court from 1937 to 1971. His appointment to the highest court in the land was imbedded with controversy, both in the Senate and in public outcry, concerning his membership in the Ku Klux Klan prior to and while

running for the U.S. Senate. However, such controversially-debated membership did not greatly hinder Black's appointment to the Supreme Court. Justice Black's legacy from his Supreme Court years includes his strong defense of First Amendment freedoms. To Black, the First Amendment was "the heart of our government"<sup>54</sup> As with his Senate years, Black's dedication to reading augmented the development of his ideas about the First Amendment. Unlike his Senate years, however, Black's ideas while on the United States Supreme Court were not limited by the expectations of a constituency.

It was in 1940 when Justice Black began to demonstrate a much stronger focus on First Amendment protections than seen previously in his life. While on the Supreme Court, he developed an absolutist approach to the First Amendment. He supported the protection of Communists under the First Amendment, opposed broad legislative investigations of subversive activity and associations, opposed content restrictions on speech, supported a free press, opposed censorship of obscenity, supported separation of church and state, advocated the unconstitutional nature of libel laws, and found malicious speech against public officials protected under the First Amendment. In the 1950s, Justice Black regularly voted on the side of Communists who were prosecuted in loyalty-security cases under a determination that the First Amendment provides protection for such beliefs and speech in accordance to such speech and political association. Black supported overturning the convictions of Communist Party leaders convicted under the Smith Act against a Court majority that upheld the convictions.<sup>55</sup>

Some of Black's dissenting opinions on the First Amendment in the 1940s and 1950s took a turn in the 1960s toward an increase of majority opinions that followed Black's lead for stronger First Amendment protections, although not as absolutist as Black would have desired. To Black, interpretation was focused on the Framers' intent, in which "Congress shall make no law" means what it says, that Congress shall make no law abridging the freedom of speech, press, and religion. However, while Black is known to have held an absolutist stance on the First Amendment, he believed that the manner in which one chooses to speak is not always provided protection under the First Amendment. He did not believe that individuals or groups had a right to speak publicly at any time, at any place they desired, or in any manner desired.

In March of 1968, Justice Black presented his ideas about the First Amendment at Columbia University Law School.<sup>56</sup> In that lecture, Black's rhetoric eloquently reviewed his perspectives about the freedom of speech and the press, and did so by reviewing several of his

opinions in First Amendment cases before the Supreme Court. Black noted that the “right to think, speak and write freely without governmental censorship or interference is the most precious privilege of citizens vested with power to select public policies and public officials” and security of this privilege for citizens comes from the First Amendment, which forbids Congress and the states to make laws abridging the exercise of these freedoms.<sup>57</sup> Black found First Amendment guarantees of freedom of speech, press, and religion so paramount as protection against despotic government so that he opined that the courts “must never allow this protection to be diluted or weakened in any way.”<sup>58</sup> Black remarked, “unfortunately, however, the Supreme Court has refused to grant absolute protection to speech under the First Amendment . . . and instead has adopted various judicial tests which are applied on a case-by-case basis to determine if the speech in question is entitled to protection.”<sup>59</sup>

Specific judicial tests applied by the courts that Black criticized as unconstitutionally limiting First Amendment protections were the balancing test and the clear and present danger test. As for the balancing test, Justice Black opined that such a test was not necessary, limited speech and the press beyond that permitted in the First Amendment, and opined that “the First Amendment’s unequivocal command that there shall be no abridgment of the rights of free speech shows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done in this field.”<sup>60</sup> The balancing test, according to Black, is the “most dangerous” because it provides that the First Amendment should be read to say “Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the government in stifling these freedoms is greater than the interest of the people in having them exercised.”<sup>61</sup> Such an interpretation calls for people’s rights to be “balanced away with the excuse that this country must be able to protect and preserve itself”, but, according to Black, “the best way to protect and preserve the country is to keep speech and press free.”<sup>62</sup> The only judicial balancing advocated by Justice Black is when a law is aimed at *conduct* and only indirectly affects speech.<sup>63</sup> As for the clear and present danger test, Black believed that this test allows for the courts to justify the punishment of advocacy that is protected under the First Amendment, and opined that the First Amendment protects speech whether or not the speech incites legal or illegal action.<sup>64</sup>

Furthermore, Justice Black did not limit First Amendment protection of speech to mere political speech, but opined that all speech, including libelous or obscene speech, is protected

under the First Amendment. Justice Black relied on the merit of citizens to determine what to hear and what to avoid, stating “Censorship, even under the guise of protecting people from books or plays or motion pictures that other people think are obscene, shows a fear that people cannot judge for themselves.”<sup>65</sup> As for libel laws, Justice Black advocated that all libel laws should be stricken from the statutes, and such action is compelled under the First Amendment.<sup>66</sup>

Although Justice Black, who is considered, even by himself, an absolutist when it comes to the First Amendment, his position had its limits. Black’s absolutism comes from his interpretation of the Founders’ intent in designing the First Amendment and envisioning America under that law. As such, Black’s interpretations of that amendment on the Court included the strict interpretation of “speech.” Black noted, “On the other hand, . . . in harmony with my general views of faithful interpretation of the Constitution as written . . . I am vigorously opposed to efforts to extend the First Amendment’s freedom of speech beyond speech, freedom of press beyond press and freedom of religion beyond religious beliefs.”<sup>67</sup> Black’s opinions on the Court have drawn a line between speech and conduct, whereas speech is protected, but conduct that is not speech is not protected. The line drawn by Justice Black is “between freedom to believe in and advocate a doctrine and freedom to engage in conduct violative of law.”<sup>68</sup>

Justice Black adopted the stance of Thomas Jefferson, that government can regulate people when they do something, but not when they say something.<sup>69</sup> Conduct Black considered to lack protection under the First Amendment includes picketing and demonstrating, whether on public or privately-own property, because “marching back and forth, though utilized to communicate ideas, is not speech and therefore is not protected by the First Amendment.”<sup>70</sup> He contended that demonstrators and street marchers can be regulated by the government. Justice Black opined that the First Amendment does not require people to listen to speakers against their will.<sup>71</sup> He also believed that the right of peaceable assembly does not extend to a guarantee that the government or private parties will supply a place to assemble.<sup>72</sup> Justice Black opined that the First Amendment language does not supply people a place to speak, write, or assemble; but provides only the right to speak, write, and assemble.<sup>73</sup> Justice Black found no First Amendment restriction on the ability of governments to require permits for groups to march in protest or otherwise express opinions and beliefs, since the government must be able to regulate the use of streets for travelers.<sup>74</sup> In addition, however, Black contended that the First Amendment forbids

laws that open up a forum for some groups while denying the forum for use to other groups or that provide for a forum expression of some views but restricts other, or opposing, views.<sup>75</sup>

### Conclusion

Clearly, *Senator Black's* stance on First Amendment freedoms were in no way close to those defended by *Justice Black*. What is demonstrated is Senator Black's inconsistency in his support for and restrictions on freedom of speech, which were largely dictated by particular legislation being proposed. Senator Black's commitment to reading and citing the works of great defenders of free speech on the Senate floor is also demonstrated; but, despite such rhetoric, it is shown that as a Senator, his first priorities were to advance policy positions, while as a Justice, he was required to develop a more sophisticated theory of the parameters of the First Amendment.

Presidents today hope that their nominees to the Court will reflect their political ideology, just as Franklin Roosevelt did in 1936. Hugo Black essentially received a pass from the Senate, but it is doubtful that he would in today's political climate if the confirmation hearing on John Tower is any example. Certainly, Black's membership in the Klan would be more than slightly problematic, and he had an extensive public record for examination, unlike the stealth nominees in recent years. However, Black's Senate arguments on freedom of expression would not reveal the full extent of his future First Amendment Jurisprudence. His Court opinions, while reflecting the same basic commitment to individual liberty, evolved considerably as he developed a more sophisticated approach to free speech issues while on the bench.

### Notes

<sup>1</sup> The author wishes to thank Melinda Shelton, James Baggett, and the Birmingham Public Library Archives Department for providing access to and information regarding Hugo Black, which was of great help in the development of this paper.

<sup>2</sup> Mark Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (Ithaca: Cornell University Press, 1984), 106.

<sup>3</sup> See Daniel J. Meador, *Mr. Justice Black and His Books* (Charlottesville: University Press of Virginia, 1974).

<sup>4</sup> Roger K. Newman, *Hugo Black: A Biography* (New York: Pantheon Books, 1994), 143.

<sup>5</sup> *Congressional Record*, 8687-91 (5-15-28), 8815.

<sup>6</sup> *Congressional Record*, 70<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 4243-49; 71<sup>st</sup> Cong., 1<sup>st</sup> Sess., 1334-36.

<sup>7</sup> CR, 71<sup>st</sup> Cong., 1<sup>st</sup> Sess, 3948; Virginia Van Der Veer Hamilton, *Hugo Black: The Alabama Years* (Baton Rouge: Louisiana State University Press, 1972) p. 168-169.

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<sup>8</sup> Roger K. Newman, *Hugo Black: A Biography* (New York: Pantheon Books, 1994), 128.

<sup>9</sup> Newman, *Hugo Black*, 128.

<sup>10</sup> *Congressional Record*, 71<sup>st</sup> Cong., 1<sup>st</sup> Session, Vol. 71 (1929), 4468.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, 4469.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, 4469.

<sup>18</sup> CR, 71<sup>st</sup> Cong., 2<sup>nd</sup> Sess., (1930), 1497-1500, 5418, 5517; see also Van Der Veer Hamilton, *Hugo Black*, at 172-173.

<sup>19</sup>

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Congressional Record*, Vol. 72, 71<sup>st</sup> Cong., 2<sup>nd</sup> Session (3/3/30-3/19/30), 5417.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, 5418.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, 5420.

<sup>29</sup> *Ibid.*, 5514.

<sup>30</sup> *Ibid.*, 5518.

<sup>31</sup> *Congressional Record*, Vol. 72, Pt. 1, 71<sup>st</sup> Cong., 2<sup>nd</sup> Session, (4/29/30 – 5/16/30), 8721-8722.

<sup>32</sup> *Ibid.*, 8721.

<sup>33</sup> *Ibid.*, 8721-8722.

<sup>34</sup> *Congressional Record*, Vol. 74, Feb.-March 1931, 6658-6659.

<sup>35</sup> *Ibid.*, 6718.

<sup>36</sup> *Congressional Record*, Vol. 77, 73<sup>rd</sup> Cong., 1<sup>st</sup> Session (4/4/33-4/24/33), 1864.

<sup>37</sup> *Ibid.*, 1924.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, 1932-1933.

<sup>40</sup> Newman, *Hugo Black*, 187, citing Hugo L. Black.

<sup>41</sup> Newman, *Hugo Black*, 211, citing Hugo L. Black.

<sup>42</sup> *Congressional Record*, Vol. 80, 74<sup>th</sup> Cong., 2<sup>nd</sup> Session (2/19/36-3/10/36), 3433.

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- <sup>43</sup> Ibid.
- <sup>44</sup> Ibid.
- <sup>45</sup> Ibid., 3434.
- <sup>46</sup> Ibid., 3435.
- <sup>47</sup> Ibid, 3436-3437.
- <sup>48</sup> Congressional Record, Vol. 80, 74<sup>th</sup> Cong., 2<sup>nd</sup> Session (4/1/36-4/21/36), 4892.
- <sup>49</sup> Ibid.
- <sup>50</sup> Ibid., 4893.
- <sup>51</sup> Ibid.
- <sup>52</sup> Congressional Record, Vol. 80, 74<sup>th</sup> Cong, 2<sup>nd</sup>. Session (4/22/36-5/8/36), 6159.
- <sup>53</sup> Ibid.
- <sup>54</sup> *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 302 (1941).
- <sup>55</sup> *Dennis v. U.S.*, 341 U.S. 298 (1957).
- <sup>56</sup> Hugo L. Black, “The First Amendment”, Third Lecture, Carpentier Lectures, Columbia University Law School, New York City, March 20, 21, and 23, 1968.
- <sup>57</sup> *Id.*, at 1.
- <sup>58</sup> *Id.*, at 2.
- <sup>59</sup> *Id.*, at 6-7.
- <sup>60</sup> *Id.*, at 7-9.
- <sup>61</sup> *Id.*, at 7.
- <sup>62</sup> *Id.*, at 7.
- <sup>63</sup> *Id.*, at 16.
- <sup>64</sup> *Id.*, at 9.
- <sup>65</sup> *Id.*, at 4.
- <sup>66</sup> *Id.*, at 5.
- <sup>67</sup> *Id.*
- <sup>68</sup> *Id.*, at 12.
- <sup>69</sup> *Id.*, at 5.
- <sup>70</sup> *Id.*, at 10.
- <sup>71</sup> *Id.*, at 10.
- <sup>72</sup> *Id.*, at 2.
- <sup>73</sup> *Id.*, at 14.
- <sup>74</sup> *Id.*, at 17.
- <sup>75</sup> *Id.*, at 15.